

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ROSE WYCOMBE CORPORATION)	
)	
COMPLAINANT)	
)	
VS.)	CASE NO. 92-443
)	
WEST OLDHAM UTILITIES, INC.)	
)	
DEFENDANT)	

O R D E R

On October 20, 1992, Rose Wycombe Corporation ("Rose Wycombe") filed a complaint against West Oldham Utilities, Inc. ("West Oldham") alleging that West Oldham had agreed to extend utility service to Rose Wycombe, but was now refusing to do so. The complaint demanded that West Oldham be directed to extend service in accordance with the agreement and that West Oldham refund, by way of credits against its utility charges, Rose Wycombe's legal expenses incurred in enforcing the agreement. The Commission, by Order of October 28, 1992, directed West Oldham to either satisfy the matters complained of or file an answer.

West Oldham filed an answer on November 16, 1992 denying any agreement with Rose Wycombe and demanding that the complaint be dismissed. Alternatively, West Oldham demanded that, if directed to extend service to Rose Wycombe, it be permitted to impose reasonable conditions of service and that it be allowed to recover its attorney's fees.

A hearing was held on the complaint before the Commission on March 11 and 12, 1993. Both parties appeared at the hearing and were represented by counsel.

DISCUSSION

West Oldham owns, controls, and operates facilities used in the distribution and furnishing of water to approximately 500 customers in northwest Oldham County and is a public utility subject to the jurisdiction of this Commission. Its president and managing officer, Wayne Wells, purchased the system from the Louisville Water Company ("Louisville Water") approximately 15 years ago. Although it is now independently owned, West Oldham operates its system essentially as an extension of Louisville Water's system. West Oldham purchases all of its water from Louisville Water through a single tap into a Louisville Water main and all of its facilities are maintained according to Louisville Water's specifications. West Oldham relies upon Louisville Water and its engineering staff for technical advice, and upon Louisville Water's business office to bill its customers. This relationship allows West Oldham, as a small utility, to avoid or reduce costly expenditures for these services. In exchange for such assistance, West Oldham must obtain Louisville Water's approval for any significant change in its operations.

Rose Wycombe is a non-stock, non-profit corporation organized in October 1991 apparently as a successor to the Rose Wycombe Homeowner's Association. Rose Wycombe's members are the owners of lots in the Rose Wycombe Subdivision in Oldham County located close

to the area served by West Oldham. The subdivision does not have water service and Rose Wycombe was formed to install a water distribution system and to purchase water from West Oldham. According to its plat, there are seven lots in the subdivision, but apparently some of those lots have been subdivided, increasing the actual number to 13. There are currently two homes in the subdivision with one more under construction. William Waddell, the president of Rose Wycombe, and his wife are the owners of the property under construction.

Contract for Service

Negotiations for water service between the parties began on February 18, 1991 with a letter to West Oldham from an engineer employed by the Rose Wycombe Homeowners Association. The letter requested West Oldham to extend to the Rose Wycombe Subdivision service that was capable of providing water for both domestic use and fire protection. Rose Wycombe maintains that the ensuing negotiations, which consisted of a series of letters between the parties or their attorneys, culminated in a contract on September 30, 1992. West Oldham admits that contractual negotiations were conducted but denies that a contractual relationship was ever established. The evidence supports West Oldham in this regard.

When negotiations began in May 1991, the parties faced three major obstacles. The first obstacle was the distance between the Rose Wycombe Subdivision and West Oldham's distribution lines. In accordance with its tariff, West Oldham can extend water only along dedicated roadways. In this case, that would have made the cost of

extending service prohibitive. The second obstacle involved the income tax liability that would accrue to West Oldham's shareholders if the property owners constructed the extension and donated it to West Oldham. Such a transfer would be a contribution in aid of construction which would be taxable income to the shareholders of West Oldham, a subchapter S corporation.

To overcome these obstacles, Rose Wycombe was formed for the purpose of constructing and operating a separate water distribution system for the Rose Wycombe Subdivision. As foreseen by the parties, Rose Wycombe would construct, along easements obtained for that purpose, a water line from a connection point in West Oldham's main across private property to the subdivision. This would shorten the route and reduce the cost of construction. To avoid any tax liability for West Oldham's shareholders, Rose Wycombe would retain ownership of the water line. Rose Wycombe would purchase its water from West Oldham through a meter owned by West Oldham but maintained at Rose Wycombe's expense. Rose Wycombe would only sell water to its members and would not be a public utility.

Although the parties were able to overcome two of their major obstacles, their inability to overcome the third has resulted in this complaint. That obstacle involves the fire protection that Rose Wycombe has requested. During the negotiations, the parties agreed that a feasible means of providing service that was adequate for fire protection was through the use of a compound 1 1/2-inch and 4-inch meter at the point of connection. This meter is

actually part of a single complex system which allows water for ordinary use to flow through the 1 1/2-inch section while the 4-inch section remains closed. However, the system is designed so that when there is a demand for increased water flow at higher pressures the 4-inch meter opens and the 1 1/2-inch meter closes. The opening of a fire hydrant is the intended means by which the demand is made upon the meter system to open the 4-inch section. The designed minimum rate of flow through the 4-inch meter is 750 gallons per minute.

Because the 4-inch meter when open would allow large volumes of water into the Rose Wycombe system, West Oldham was concerned about its use. West Oldham's biggest concern was the financial effect a large volume of water going into the Rose Wycombe system would have upon West Oldham if Rose Wycombe did not pay for the water. Under these circumstances, West Oldham would still be obligated to pay Louisville Water for the water. While Rose Wycombe maintains that its bylaws protect West Oldham, that issue was never resolved to the satisfaction of West Oldham.

Another concern West Oldham had about the 4-inch meter involved the loss of pressure in its system if the meter was activated. That concern also remained unresolved. Nevertheless, despite the failure to resolve all issues, Rose Wycombe maintains that the parties did reach a binding agreement which committed West Oldham to provide water to Rose Wycombe through a compound 1 1/2-inch and 4-inch meter with sufficient pressure to provide fire protection.

The key documents in this regard are a series of letters between Rose Wycombe and West Oldham, or their attorneys, that were delivered between August 26, 1992 and September 30, 1992. The first letter delivered on August 26, 1992 from West Oldham's attorney to Rose Wycombe included a draft of a proposed contract which provided, in part, that West Oldham would furnish water through the combination meter so that fire protection would be available to the subdivision. The letter, though, clearly stated that the contract had not been reviewed by West Oldham and was only enclosed to expedite the negotiations. This letter was followed on September 1, 1992 by a second letter sent on behalf of West Oldham stating that West Oldham had reviewed the proposed contract and made only one specific change. Taken together, the two letters did constitute a definite offer from West Oldham to be bound by the terms of the proposed written contract modified only by the additional condition contained in the second letter. However, Rose Wycombe responded on September 11, 1992 by specifically rejecting the offer.

On September 24, 1992, West Oldham made a second offer. That offer included some additional conditions that were not part of the contract sent to Rose Wycombe on August 26, 1992. Rose Wycombe responded by redrafting the August 26, 1992 contract, and adding only the condition contained in the September 1, 1992 letter from West Oldham. The redraft did not contain all of the conditions in the September 24, 1992 letter from West Oldham, and there is no evidence that Rose Wycombe ever agreed to those conditions.

Nevertheless, because West Oldham never withdrew its first offer, Rose Wycombe maintains that when, on September 30, 1992, it redrafted and mailed the contract sent to it earlier by West Oldham adding only the condition requested by West Oldham, it effectively accepted the offer thereby creating a binding agreement between the parties. Rose Wycombe's argument in this regard fails as a matter of law.

Although West Oldham never explicitly withdrew the offer contained in its correspondence of August 26, 1992 and September 1, 1992, such withdrawal was not necessary. Rose Wycombe's rejection of the offer on September 11, 1992 rendered it inoperable and it could no longer be revived by a later acceptance. Restatement, Contracts, 2d, Section 38(1). Therefore, the contract prepared by Rose Wycombe and sent to West Oldham on September 30, 1992 did not establish a contract between the parties. VIDT, et al. v. Burgess, 281 Ky. 644, 136 S.W.2d 1080 (1940).

Extension of Service

West Oldham is willing to extend service to Rose Wycombe through a 1 1/2-inch meter generally under the terms and conditions of the written agreement first prepared by West Oldham. Rose Wycombe has been unwilling to agree to such an extension because the flow of water through a 1 1/2-inch meter will not be sufficient to provide fire protection. If a 1 1/2-inch meter is used, fire protection can only be obtained by installing a water tower in the Rose Wycombe Subdivision.

The authority of the Commission to compel a utility to extend service is found in KRS 278.280(3). That section of the statute provides in part:

Any person or group of persons may come before the commission and by petition ask that any utility be compelled to make a reasonable extension.

In determining whether a requested extension is reasonable, one of the factors to be considered is whether the proposed extension will place an unreasonable burden upon the utility.

Rose Wycombe maintains that the use of a 4-inch meter will not affect the West Oldham system. In support of its position, Rose Wycombe relies upon the recommendations made by Louisville Water's engineers who approved the use of a 4-inch meter provided that no fire hydrant in the Rose Wycombe Subdivision be located below the 580-foot elevation level. Rose Wycombe has designed its system so that it conforms to the conditions imposed by Louisville Water.

West Oldham maintains that the use of a 4-inch meter will have an adverse affect upon its system. In support of its position, West Oldham relies upon Warner Arthur Broughman III, a civil and sanitary engineer specializing in water and wastewater fields. West Oldham retained Broughman to study the feasibility of installing a 4-inch meter at the point of connection. To perform the study, Broughman constructed a computer model of both the West Oldham system and the proposed Rose Wycombe system to determine what affect the use of the 4-inch meter would have upon the West Oldham system. Broughman found that there are areas in the West

Oldham system where water pressure barely meets the minimum requirements of this Commission. Although the addition of customers in the Rose Wycombe Subdivision will not lower pressures below acceptable levels when water is used for normal domestic purposes, Broughman found that if the flow increases to 750 gallons per minute into the subdivision for an event such as a fire, it would reduce pressure in many areas of the West Oldham system to levels that are substantially below required levels and, in some cases, might even create a vacuum in parts of the system. Broughman estimated that approximately 400 of West Oldham's 500 customers would be affected by the reduction in pressure.

Additionally, other events could occur which would activate the 4-inch meter and have the same effect upon the West Oldham system. An example of such an event would be a break in the Rose Wycombe water line.

In constructing his computer model, Broughman used incorrect data. For example, he assumed that the Rose Wycombe main would be eight inches in size throughout when, in fact, it would be six inches to the 580-foot elevation and four inches below. However, these mistakes did not affect his conclusions because the model was based on the rate of flow through the system.

Although Broughman's opinion appears to conflict with Louisville Water's engineers' approval of a 4-inch meter, that approval was most likely based upon an assumption by Louisville Water that West Oldham would have a second tap into Louisville Water's system when the Rose Wycombe extension was made.

Louisville Water has recommended a second tap to allow for future expansion of the system to make it a more viable enterprise and to overcome problems of low pressure which arise from time to time in the West Oldham system. A second tap would also make a 4-inch meter on the Rose Wycombe line feasible. However, a request for Commission approval of a second tap was not properly presented, and the approval was denied. Although it would appear to be a benefit to West Oldham, unless or until it makes a second tap into the Louisville Water system in the manner recommended by Louisville Water, West Oldham should only be required to extend service to Rose Wycombe through a 1 1/2-inch meter. Furthermore, the water service furnished should be subject to the conditions set forth in the proposed contract sent to Rose Wycombe on September 24, 1992 to the extent that the provisions contained in the contract are consistent with service through a 1 1/2-inch meter alone.

Attorney's Fees

Each party alleges that the other failed to act reasonably or in good faith during the course of their negotiations and that, as a consequence, each should be awarded its attorney's fees incurred by reason of the other's failure. Because the claims are based on misconduct, they are, in effect, claims for damages.

It is well settled that administrative agencies are creatures of the legislature whose authority is limited to that conferred upon them by statute. Kerr v. Kentucky State Board of Registration, Ky. App., 797 S.W.2d 714, 717 (1990). Therefore, unless there is a provision in the statute authorizing the

Commission to award damages, the claim for attorney's fees must be denied.

The authority conferred upon the Commission by the legislature is defined by the provisions of KRS 278.040. While Subsection (2) of that section confers upon the Commission jurisdiction over rates and services of utilities subject to its regulation, there is no authority in the statute to award attorney's fees or damages arising out of a utility's misconduct. Carr v. Cincinnati Bell, Inc., Ky. App., 651 S.W.2d 126, 128 (1983). Therefore, the claim for attorney's fees by each party should be denied.

This Commission being otherwise sufficiently advised,

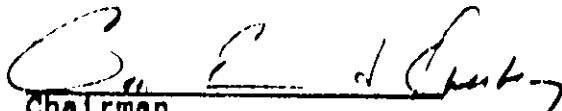
IT IS THEREFORE ORDERED that:

1. West Oldham shall extend service to Rose Wycombe through a 1 1/2-inch meter in accordance with the provisions of the proposed contract sent to Rose Wycombe by West Oldham on September 24, 1992 to the extent that the provisions of that agreement are consistent with the terms of this Order.

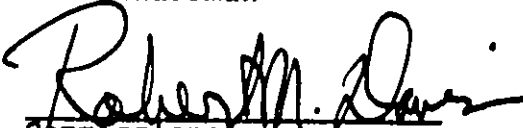
2. The claims by each party for attorney's fees from the other be and are hereby denied.

Done at Frankfort, Kentucky, this 7th day of June, 1993.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:



Executive Director